INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 1

Statement of the Case 2

Argument 3

Conclusion 11

TABLE OF CASES CITED

Brown v. P. R. R., 2 Cir. 158 F. 2d 795 11

Callen v. P. R. R., 162 F. 2d 832 ..... 2, 3, 8

Chicago & N. W. R. R. Co. v. Wilcox, 116 F. 913, 914 (C. C. A. 8, 1902) 8, 9

Dice v. Akron C. & Y. R. R., 72 S. Ct. 312, 342 U. S. 359 3

Garrett v. Moor-McCormick Co., 317 U. S. 239 8

Great Northern R. Co. v. Donaldson, 246 U. S. 121, 38 S. Ct. 230 (1917) 9

Lilly v. Grand Trunk Western R. Co., 317 U. S. 481, 485, 63 S. Ct. 347 (1943) 9

Lion Oil Ref. Co. v. Albritton, 21 F. 2d 280 (1927) 10

Scheer v. Rockne Motors Corp., 68 F. 2d 942, 945 (C. C. A. 2, 1934) 10

PAGE

Steele v. Erie R. R., 54 F. 2d 688, affirmed 54 F. 2d 690 (C. C. A. 2, 1931) 10

Sullivan v. Elgin J. & E. R. Co., 73 N. E. 2d 632 (Ill., 1947) 10

Texas & Pac. Ry. Co. v. Dashiell, 198 U. S. 521, 25 S. Ct. 521 (1905) 10

MISCELLANEOUS

Federal Employers' Liability Act 8, 9, 10, 11

28 U. S. C. §1254(1) 1

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 69a-73a) is reported in 98 F. Supp. 212. The first opinion of the Court of Appeals (R. 6a-7a) is not reported. Its second opinion is reported in 198 F. 2d 631.

The opinion of the District Court for the Eastern District of Pennsylvania after the first trial of this case is not printed in the record. It is reported in 96 F. Supp. 698. It is significant, because it concedes that there was a 'preponderance' of evidence that the release was obtained by fraud or mistake.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1952 (R. 20a-21a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED.

1. Did not the Court below properly hold that a mere "preponderance" of evidence, as distinguished from evidence which was "clear, convincing and indubitable" was sufficient to sustain a jury finding that the release was obtained by fraud, accident or mistake?

STATEMENT OF THE CASE.

Suffice it to say that the plaintiff brought this action under the Federal Employers' Liability Act for injuries sustained while at work. According to the facts, all that the plaintiff was seeking and all that the Claim Agent intended to pay him at the time the release was obtained were his lost wages for the period during which he was away from work following the accident. There was no discussion of a settlement of the claim for damages, nor did the plaintiff intend at that time to settle that claim, as he was yet unable to determine the exact nature and extent of his injuries or the prognosis thereof. The Claim Agent had the plaintiff execute such a release in the mistaken belief that it was a receipt for wages. The plaintiff then endorsed the check given in payment thereof, and did not read the "fine print" thereon that repeated the language of the release mistakenly or fraudulently obtained from the plaintiff and which he believed was a receipt for wages.

The jury answered "NO" to this inquiry: "Did the plaintiff know that he was signing a release in his claim for injuries?"

A verdict of One thousand ($1000.00) Dollars was rendered for the plaintiff.

Judgment n. o. v. was entered on the ground that though there was a preponderance of evidence adequate to support the jury finding of mistake or fraud in the release, it was not evidence which was clear, convincing and indubitable within the language of the case of *Callen v. P. R. R.*, 162 F. 2d 832.

Argument

The Court of Appeals affirmed without the opinion being reported.

This Court then decided the case of *Dice v. Akron C. & Y. R. R.*, 72 S. Ct. 312, 342 U. S. 359. The Court of Appeals then granted a petition for rehearing and reversed its former action, its opinion being found in 198 F. 2d 631. The Court of Appeals reversed and held that since admittedly there was a preponderance of evidence in support of the jury verdict and a finding that there was a mistake or fraud in obtaining the release, the jury verdict in favor of the employee should be affirmed. The Court also added that it was specifically retreating from its former view, expressed in the case of *Callen v. P. R. R.*, supra, in the Court of Appeals, that a release cannot be set aside except by evidence which was clear, convincing and indubitable. It held that this Court has made it clear that there is no justification for imposing upon an employee the burden of proving accident, mistake or fraud in a release by such an onerous and rigorous quantum as "clear, convincing and indubitable" and that a mere "preponderance" would suffice.

The railroad filed this petition for certiorari.

ARGUMENT.

1. *Mere "Preponderance" of Proof of Fraud, Accident or Mistake in a Release is Sufficient to Sustain Setting Aside Such Release.*

A short reference to the evidence is in point at this place. At page 51a, Claim Agent Colehower, on interrogation by counsel for the plaintiff was asked:

"Q. Now, then, it was your intention when you prepared the check for $45, it was your intention to pay Purvis for the loss of wages only, wasn't it?

"MR. DeLONE: Objected to.

"THE WITNESS: It was not.

"BY MR. WHITE:

"Q. Now, let me refresh your recollection.

"THE COURT: Have you finished?

"THE WITNESS: No, I wasn't.

"MR WHITE: Oh, sorry.

"THE COURT: Go ahead, you may finish.

"THE WITNESS: It was not. It was my intention to settle his claim for personal injuries, using the loss of wages as a basis therefor.

"BY MR. WHITE:

"Q. I see. Well, now, do you recall being a witness for the railroad at the trial in November 11, 1947, or November 12th?

"A. Yes, I do.

"Q. Well, now, I refer you to transcript of testimony, page 162, and ask you whether you recall this question?

'Now, then, Mr. Colehower, it was your intention to pay him for his lost wages only, wasn't it?

A. Yes, I would say that.'

"Now, do you remember that testimony?

"A. Yes.

"Q. And is that the case?

"A. That is correct. It was my intention to pay him only an amount covering his loss of wages.

"Q. I see, and it was lost wages that was being discussed primarily at that time?

"A. I wasn't quite through with what information I had then.

"Q. How did you compute the matter of $45, Mr. Colehower?

"A. His daily rate, as I remember it, was $7.82. By multiplying that by six days, I get the figure of $46.92, I believe it is. I asked him if he was willing to accept $45, and he said that he was.

"Q. And that was considered by both of you as the amount of his lost wages for the six-day period?

"A. It was considered by me as a settlement of his claim.

"Q. Well, now, were you aware at that time that Mr. Purvis was still under medical attention?

"A. No, sir."

Without being repetitious, there can be no doubt that the jury could find from the plaintiff's testimony that, without contradiction, he believed he was executing a receipt for wages only. Indeed, at page 50, Mr. Colehower testified in corroboration that "he (plaintiff) asked for payment covering his time lost." Likewise, Colehower, on cross-examination, admitted that at a prior trial he had testified not that he thought he was settling the claim but, to the contrary, that he was only paying Purvis his wages. Thus:

"Now, then, Mr. Colehower, it was your intention to pay him for his lost wages, only, wasn't it?

"A. Yes I would say that."

It is true that many lines later he reiterated his present contention that he considered what he was doing as a settlement of the whole claim rather than a payment of wages. But it was for the jury to say which of his two statements it was going to believe and, by its verdict, the jury had a right

to believe, and did believe, that Colehower as well as Purvis intended only to pay Purvis his lost wages as such.

If this is true, then clearly no release was ever intended by either of the parties with respect to the injuries. If this is true, neither of the parties agreed upon execution of a release and Colehower was guilty of fraud when he had the plaintiff execute a release and endeavored to get him to do so by hiding the words "This Is A Release." This, likewise, was for the jury to decide and the jury did so decide by finding for the plaintiff.

However, giving Colehower the benefit of the doubt as to his honorable intentions and assuming that he intended this to be a settlement of the whole claim, there would still be a mutual mistake of fact—Colehower, intending to settle the whole claim,—the plaintiff intending to receive payment for his lost wages without consideration of his claim for his injuries.

Nor can the signature of the plaintiff on the check, under the fine print on the back of the check, be of any help to the defendant. Admittedly, there was evidence from which the jury could find that the plaintiff had not read that material on the check.

The legal effect of his failure to read it, under the Dice case, is merely that he was guilty of negligence.

The Supreme Court of the United States now has said in the *Dice* case:

> "Second. In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to

recover just compensation for injuries negligently inflicted by their employers. * * * We hold that the correct federal rule is that * * * a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release * * *."

Therefore, once there is adequate evidence that the jury could find that there was any fraud in the execution of the release itself, the negligence of Purvis in failing to read the printed material on the check in completion of the release is of no importance, as the release must be held to be void.

The check is but mere payment pursuant to the terms of the release. Payment is but one of the conditions of the release. If the primary thing—the release—fails, the check cannot have any significance. The employee did not agree to give two releases for his wages. As Judge McLaughlin, in the Court of Appeals, said:

"Whatever might be said about him agreeing to sign the release there is not the slightest evidence that he agreed to sign two releases for forty-five dollars. According to the railroad he was given what was represented as the equivalent of money in consideration of his release. In order to actually obtain his property, the forty-five dollars, he was forced to formally endorse the check but not as a reaffirmance of the release which the jury found he never signed with knowledge. We reject as unreasonable the theory of the endorsement indicating ratification of the release as a matter of law where as here Purvis at the time did not even know he

had executed a release. Rockwell v. Capital Traction Co., 25 App. D. C. 98. See also Miles v. Lavender, 9 Cir., 10 F. 2d 450; Penn Mutual Life Ins. Co. v. Ashton, 10 Cir., 93 F. 2d 565, 567, 568; Whitmarsh v. Pennsylvania R. Co., D. C. E. D. Pa., 61 F. Supp. 850; Brown v. Pennsylvania R. Co., 2 Cir., 158 F. 2d 795. * * *"

The jury finding that the employee did not know or believe he was executing a release of his claims is dispositive of the issue.

When we were before this Court in the case of *Callen v. P. R. R.*, supra, previously, we strongly urged, without success, that this Court should adopt a rule for railroad employees similar to that announced in favor of seamen in *Garrett v. Moore-McCormick Co.*, 317 U. S. 239, that would impose the burden of establishing the validity of a release on the employer. By a Court divided five to four, we failed in our purpose. However, left undecided by this Court in the *Callen* case, but now clearly decided in the *Dice* case, is the question of what quantum of proof a railroad employee needs to set aside a release. In virtual unanimity of opinion, this Court, in the *Dice* case, held that "*such proof of fraud need be only by a preponderance of relevant evidence*" (emphasis ours). This language is to be found in the dissenting opinion of Mr. Justice Frankfurter. It is a fortiori, the view of the majority who refused to send the case back at all for retrial on the issues and ordered judgment for the employee reinstated then and there.

This is obviously the unanimous view of this entire Court. It is one of the phases of the Federal Employers' Liability Act in which there is no dispute among the members of this Court. And rightly so.

The vicious doctrine of the case of *Chicago & N. W. R. R.*

Co. v. Wilcox, 116 F. 913, 914 (C. C. A. 8, 1902), is the view to which the petitioner seeks to have this Court now revert and adopt in this phase of labor relations. Even that Court was divided and Judge Thayer wrote a vigorous dissent which, today, is everywhere followed.

Nor until the Court of Appeals for the Third Circuit, in unnecessary dicta, repeated that language in the *Callen* case, did the *Wilcox* view find itself restated in Federal Employers' Liability Act cases in the Courts of the United States.

What is the Federal common law on releases? This Court in the *Garrett* case, supra, reviewed some of the cases under the Federal Employers' Liability Act (non-maritime tort actions). The cases cited in footnote 17 of that case all sustained judgments for the injured employee and held the releases properly set aside. None set up the severe and strained standard of proof suggested by *Chicago & N. W. R. Co. v. Wilcox*, supra, upon which the Court below here relied. There was some conflict between the various Federal courts as to the burden of proof on releases in ordinary tort actions, but none in Federal Employers' Liability Act cases until the *Callen* case. The Court of Appeals (C. A. 3) in *Callen*, supra, relied on the *Wilcox* case, supra, where by a *divided* court, it was held that, "* * * A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is *clear, unequivocal and convincing*" (emphasis supplied).

Wilcox was a simple tort case, not involving a master-servant relationship and was not an action under a Federal statute, written as was the Federal Employers' Liability Act to give the widest possible protection to injured railroad employees. *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 485, 63 S. Ct. 347 (1943); *Great Northern R. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230 (1917).

Argument

The *Wilcox* case is more revered for its antiquity than its authoritativeness or scholarliness. In employee suits against railroads prior to the Federal Employers' Liability Act and since the passage of that Act, most courts have not followed the decision of the *Wilcox* case. Some have expressly preferred the dissenting opinion of Judge Thayer in that case. Even the few in non-master-servant tort cases which seemingly cited the *Wilcox* case with approval, managed to set aside the releases by distinguishing it or by holding the evidence adequate to meet the *Wilcox* test. *Lion Oil Ref. Co. v. Albritton*, 21 F. 2d 280 (1927).

Thus, in *Steele v. Erie R. R.*, 54 F. 2d 688, affirmed 54 F. 2d 690 (C. C. A. 2, 1931), a Federal Employers' Liability Act case, the *Wilcox* rule was rejected.

The case of *Texas & Pac. Ry. Co. v. Dashiell*, 198 U. S. 521, 25 S. Ct. 521 (1905), is on "all fours" with the instant case.

Even in an ordinary tort suit, *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942, 945 (C. C. A. 2, 1934), Judge L. Hand said:

> "These assurances were much more positive than that before the Court in Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8). *The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent*" (emphasis supplied).

Today, in most enlightened jurisdictions, there need not even be a *mutual* mistake of fact as to the injury. It is sufficient if there is a bona fide unilateral mistake as to the nature and extent of the injury. In the recent case of *Sullivan v. Elgin J. & E. R. Co.*, 73 N. E. 2d 632 (Ill., 1947), it was held that the release to an employer from future liability for past injuries sustained by the employee is void

unless based upon valuable consideration and that the release, in that case, executed by the employee without knowledge as to the seriousness of his injury, would be set aside, whether or not the employer was aware at the time that the employee had suffered serious brain injury, as a mistake of fact need not be mutual.

The exact facts, language of the release and check, indeed the same employer defendant, were involved in *Brown v. P. R. R.*, 2 Cir. 158 F. 2 795. That Court set aside that release and predicated its ruling on the same legal principles now adopted by the 3rd Circuit in this opinion, from which this petition appeals.

CONCLUSION.

We respectfully submit that this petition for certiorari should be denied as this Court already passed on the issue of law in the *Dice* case, supra. The view there expressed by this Court is fair and reasonable and in conformance with enlightened labor relations, and is that view most likely to promote a fair administration of the Federal Employers' Liability Act.

Respectfully submitted,

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